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Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted] 629

T. H. SUMTER AND WIFE, VIOLA M. SUMTER,

Appellants,

versus

BUFORD R. SHEFFIELD, ET AL.,

Appellees.

Petition for Writ of Certiorari from United States Court of Appeals, Fifth Circuit.

No. 14,396.

T. H. SUMTER,
Attorney for Appellants.

8466 Howard Dr.,
Houston (17) Texas.

IN THE UNITED STATES SUPREME COURT.

No.

T. H. SUMTER AND WIFE, VIOLA M. SUMTER,
Appellants,

versus

BUFORD R. SHEFFIELD, ET AL.,
Appellees.

Petition for Writ of Certiorari from United States Court of Appeals, Fifth Circuit.

No. 14,396.

The Circuit Court dismissed the appeal on consideration of the Motion of Appellees; "because not timely taken." See; Brief for Appellees (page 1, par. 1).

Whereas the appeal is in time to-wit; under Rule 73 (a) Appendix to Rule 10 Federal Rules of Civil Procedure it states, " * * * the time * * * shall be 30 days from the entry of the Judgment * * *.

The Judgment of Dismissal was entered July 24, 1952. (Tr. pp. 42, 2.)

The appellants Notice of Appeal was filed August 11, 1952 (Tr. p. 43).

Cash bond of $250.00 was deposited.

Even if the Notice of Appeal had not been timely taken; it would have been due solely to the appellees' tampering with the appellants' mail which is directed to the appellants' homestead, (8466 Howard Drive, Houston 17, Texas) this property being the homestead the appellees are attempting to defraud the appellants of.

Under rules of the Supreme Court Rule 38 Par. 5(b). The Circuit Court has so far departed from the accepted and usual course of judicial proceedings; by not noticing this mistake; and has sanctioned such a departure by the lower court in ignoring a plain case of mail fraud as to call for an exercise of this courts' power of supervision.

It is respectfully submitted, and these appellants move the court to grant this writ because the appeal was timely taken.

Respectfully submitted,

T. H. Sumter

T. H. SUMTER,
Attorney for Appellants.

8466 Howard Dr.,
Houston (17) Texas.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 629

T. H. SUMTER AND WIFE, VIOLA M. SUMTER, *Petitioners*

v.

BUFORD R. SHEFFIELD, ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Brief for the Respondents, W. Carloss Morris, Jr., Stewart Title Company, Stewart, Burgess & Morris, and Stewart Title Guaranty Company (also erroneously named in the complaint as "Stewart Title Guaranty Company of Texas") in opposition.

Opinions Below

The opinion of the District Court is reported at T. H. SUMTER AND WIFE, VIOLA M. SUMTER v. BUFORD R. SHEFFIELD, ET AL., 116 F. Supp. 373. The action of the Court of

Appeals is reported as T. H. SUMTER AND WIFE, VIOLA M. SUMTER, APPELLANTS, v. BUFORD R. SHEFFIELD, ET AL., APPELLEES, No. 14396, C.C.A. 5th, 207 F. 2d 958.

Objection to Jurisdiction

This Court is without jurisdiction to grant a petition for writ of certiorari in this cause for the reasons that:

1. The petition for writ of certiorari is not accompanied by a certified transcript of the record in the case, including the proceedings in the Court to which the writ is asked to be directed, as required by Supreme Court Rule 38, par. 1, which reads as follows:

> "A petition for review on writ of certiorari of a decision of a state court of last resort, a circuit court of appeals, or the United States Court of Appeals for the District of Columbia, shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed. For printing record see paragraph 7 of this rule."

2. The petition for writ of certiorari does not contain a statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the judgment or decree in question, as required by Supreme Court Rule 12, par. 1, which reads in part as follows:

> "Upon the presentation of a petition for the allowance of an appeal to this Court, from any court, to any judge or justice empowered by law to allow it, there shall be the presented by the applicant a separate typewritten statement particularly disclosing the basis

upon which it is contended that this Court has jurisdiction upon appeal to review the judgment or decree in question.";

and also as required by Rule 38, par. 2, which in part provides:

"The petition [for review on writ of certiorari] shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that the court has jurisdiction to review the judgment or decree in question (see Rule 12, par. 1);"

3. Petitioners did not file their petition together with the record, and their supporting brief with the Clerk of this Court within ninety days after entry of the judgment or decree of the Court of Appeals (November 4, 1953), as required by Supreme Court Rule 38, par. 2, the relevant part of which states:

"The petition will be deemed in time when it, the record, and the supporting brief are filed with the Clerk within the period prescribed by section 8 of the Act of February 13, 1925 * * *";

and as prescribed by section 2101(c), Title 28, U.S.C., JUDICIARY AND JUDICIAL PROCEDURE, which provides:

"Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of

> the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

It appears that no transcript of the record including the proceedings in the Court of Appeals or supporting brief have at all been filed.

4. Petitioners did not serve on counsel for these Respondents notice of the filing of the petition within ten days after the filing, and it does not appear that the time for serving notice was enlarged (counsel for these Respondents first received notice of such filing on March 22, 1954, which notice came in the U. S. Mails in an envelope postmarked "Tahuya, Wash., March 20, P. M. 1954"), nor have Petitioners ever served on these Respondents or any of them or on their counsel a copy of the printed record including the proceedings in the Court to which the writ is asked to be directed, or a copy of their brief in support of their petition, as required by Supreme Court Rule 38, par. 3, which prescribes that:

> "Notice of the filing of the petition, together with a copy of the petition, printed record, and supporting brief shall be served by the Petitioner on counsel for the Respondent within ten days after the filing * * *."

Objection to False Statement in Petition For Writ of Certiorari

On page 2 of their petition, Petitioners state: "Even if the notice of appeal had not been timely taken, it would have been due solely to the Appellees' tampering with the Appellants' mail which is directed to the Appellants' homestead (8466 Howard Drive, Houston 17, Texas), this

property being the homestead the Appellees are attempting to defraud the Appellants of."

The above quoted statement is unconditionally false. None of these Respondents, as Petitioners well know, have ever tampered or interfered with Petitioners' mail, nor have any of these Respondents ever attempted to defraud Petitioners' of their homestead or any other property. Such statement on Petitioners' part is entirely unwarranted and constitutes a deliberate misrepresentation to this Court, and these Respondents object to the same and move that the same be stricken from the petition.

Questions Presented

1. Whether the District Court correctly held that it lacked jurisdiction of Petitioners' complaint.

2. Whether the Court of Appeals erred in dismissing the appeal.

Statutes and Regulations Involved

The applicable statute and Regulations are printed in the Appendix, infra, pp. 9-12.

Statement

Petitioners originally filed a complaint against these Respondents and others in the District Court of the United States for the Southern District of Texas, Galveston Division. The complaint is found at pages 5, 6, and 7 of the transcript of the record of the proceedings in the District Court which was filed in the United States Court of Appeals for the Fifth Circuit in Cause No. 14,396. On motion of these Respondents the District Court dismissed the complaint on the ground that jurisdiction was lacking in that:

1. The complaint fails to show the citizenship of each Plaintiff and Defendant and that no Plaintiff is a citizen of the same state with any Defendant. Hence, jurisdiction cannot be sustained on the basis of diverse citizenship.

2. The complaint fails to allege any facts showing any dispute or controversy relative to the construction, operation or effect of the constitution, laws, or treaties of the United States. Hence, jurisdiction cannot be sustained on the existence of a Federal question.

3. The complaint discloses no other ground or statute under which jurisdiction of a Federal Court may be sustained.

The motions to dismiss are found at pages 8 through 17, and the Order of Dismissal of the District Court, dated July 2, 1952, and filed July 3, 1952, is found at pages 38 through 41 of the transcript of the proceedings had in the District Court.

On August 11, 1952 (being more than 30 days after July 3, 1952) Petitioners filed a Notice of Appeal which appears at page 43 of said transcript, as follows: "Come now Plaintiffs, appealing the Order of Judge T. M. Kennerly, of July 2, 1952, dismissing above case for lack of jurisdiction, to the United States Court of Appeals for the Fifth Circuit."

Upon motion contained in the Respondents' brief, the Court of Appeals dismissed the appeal because it was not taken within thirty days after entry of the judgment or order appealed from.

Argument

The District Court correctly dismissed the complaint for lack of jurisdiction. The complaint does not disclose diversity

of citizenship between Plaintiffs and Defendants; nor does the complaint allege any facts showing that Plaintiffs' cause of action, if any they have, arises under the constitution, laws or treaties of the United States. The complaint invokes no other statute under which jurisdiction may be sustained.

The Court of Appeals correctly dismissed the appeal because it was not timely taken. The Order appealed from was entered July 3, 1952. The Notice of appeal was filed August 11, 1952, which was more than thirty days after entry of the Order, hence, it was not timely filed. Section 2107, Title 28, U. S. CODE, JUDICIARY AND JUDICIAL PROCEDURE provides:

> "Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a Court of Appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."

Petitioners' appeal did not fall within any exceptions enumerated which except actions in which the United States or any officer or agency thereof is a party, proceeding in admiralty, bankruptcy matters and other proceedings under Title 11, nor was the time for appeal extended by the District Court. Rule 73(a), FEDERAL RULES OF CIVIL PROCEDURE, provides in part:

> "When an appeal is permitted by law from a District Court to a Court of Appeals the time within which an appeal may be taken shall be thirty days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof

is a party the time as to all parties shall be sixty days from such entry * * *."

In any event, had the notice of appeal been timely filed, the Court of Appeals should have been constrained to affirm the judgment or Order of the District Court. Therefore, there is no reason for this Court to grant a review on writ of certiorari.

The decision of the Court of Appeals has not departed from the accepted and usual course of judicial proceedings.

Conclusion

The petition for writ of certiorari should be dismissed or in the alternative denied.

Respectfully submitted,

STEWART, BURGESS & MORRIS,

By _____
W. CARLOSS MORRIS, JR.
Attorneys for Respondents,
W. CARLOSS MORRIS, JR.,
STEWART, BURGESS & MORRIS,
STEWART TITLE COMPANY, and
STEWART TITLE GUARANTY COMPANY (also erroneously named in the complaint as "STEWART TITLE GUARANTY COMPANY OF TEXAS").

Guaranty Building,
1302 Rusk Avenue,
Houston, Texas

APPENDIX

Statutes and Rules Involved

STATUTES:

Section 2101(c), Title 28, U. S. Code, Judiciary and Judicial Procedure: Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Section 2107, Title 28, U. S. Code, Judiciary and Judicial Procedure: Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party the time as to all parties shall be sixty days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original

time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11. June 25, 1948, c. 646, 62 Stat. 963, amended May 24, 1949, c. 139, Sections 107, 108, 63 Stat. 104.

RULES:

Supreme Court Rule 38, Par. 1: A petition for review on writ of certiorari of a decision of a state court of last resort, a circuit court of appeals, or the United States Court of Appeals for the District of Columbia, shall be accompanied by a certified transcript of the record in the case, including the proceedings in the court to which the writ is asked to be directed. For printing record see paragraph 7 of this rule.

Supreme Court Rule 38, Par. 2: The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which it is contended that this court has jurisdiction to review the judgment or decree in question (See Rule 12, par. 1); the questions presented; and the reasons relied on for the allowance of the writ. Only the questions specifically brought forward by the petition for writ of certiorari will be considered. A supporting brief may be annexed to the petition or presented separately, but it must be direct and concise. (See Rules 26 and 27.) A failure to comply with these requirements will be a sufficient reason for denying the petition. See United States v. Rimer, 220 U. S. 547, 31 S. Ct. 596, 55 L. Ed. 578; Furness, Withy & Co. v. Yang-Tsze Insurance Ass'n, 242 U. S. 430, 37 S. Ct. 141, 61 L. Ed.

409; Houston Oil Co. v. Goodrich, 245 U.S. 440, 38 S. Ct. 140, 62 L. Ed. 385; Layne & Bowler Corporation v. Western Well Works, 261 U. S. 387, 392, 43 S. Ct. 422, 423, 67 L. Ed. 712; Magnum Import Co. v. Coty, 262 U.S. 159, 163, 43 S. Ct. 531, 532, 67 L. Ed. 922; Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508, 44 S. Ct. 164, 68 L. Ed. 413. Forty printed copies of the petition and supporting brief shall be filed. The petition will be deemed in time when it, the record and the supporting brief, are filed with the clerk within the period prescribed by section 8 of the Act of February 13, 1925 [28 U.S.C.A. Section 2101] except that in cases of petition to this court for writ of certiorari to review a judgment of a circuit court of appeals or of the United States Court of Appeals for the District of Columbia in criminal cases within the provisions of the Act of March 8, 1934 [18 U.S.C.A. section 3772], the petition shall be made within the period prescribed pursuant to said Act in Rule XI of the Rules of Practice and Procedure, promulgated May 7, 1934 (292 U.S. 661, 666, 54 S. Ct. XXXIX).

Supreme Court Rule, Par. 3: Notice of the filing of the petition, together with a copy of the petition, printed record, and supporting brief shall be served by the petitioner on counsel for the respondent within ten days after the filing (unless enlarged by the court or a justice thereof), and due proof of service shall be filed with the clerk. If the United States, or any officer or agency thereof, is respondent, the service of the petition, record, and brief shall be made on the Solicitor General at Washington, D. C. Counsel for the respondent shall have thirty days (unless enlarged by the court or a justice thereof), after notice, within which to file forty printed copies of an opposing brief, conforming to Rules 26 and 27. The brief must bear

the name of a member of the bar of this court at the time of filing.

Supreme Court Rule 12, Par. 1 (relevant part): Upon the presentation of a petition for the allowance of an appeal to this court, from any court, to any judge or justice empowered by law to allow it, there shall be presented by the applicant a separate typewritten statement particularly disclosing the basis upon which it is contended that this court has jurisdiction upon appeal to review the judgment or decree in question. The statement shall refer distinctly (a) to the statutory provision believed to sustain the jurisdiction, (b) to the statute of the state, or statute or treaty of the United States, the validity of which is involved (giving the volume and page where the statute or treaty may be found in the official edition), setting it out verbatim or appropriately summarizing its pertinent provisions; and (c) to the date of judgment or decree sought to be reviewed and the date upon which the application for appeal is presented.

Rule 73(a) Federal Rules of Civil Procedure (relevant part): When an appeal is permitted by law from a district court of appeals the time within which an appeal may be taken shall be thirty days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or any officer or agency thereof is a party the time as to all parties shall be sixty days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed.